91-1782

Supreme Court, U.S.
FILED
MAY 4 1992
OFFICE OF THE CLERK

No. 91-_____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

- PAUL DELO,

Petitioner,

vs.

LARRY GRIFFIN,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI
VOLUME I

WILLIAM L. WEBSTER
Attorney General

STEPHEN D. HAWKE
Assistant Attorney General
Counsel of Record

FRANK A. JUNG
Assistant Attorney General
Of Counsel

P. O. Box 899
Jefferson City, MO 65102
(314) 751-3321

Attorney for Petitioners

90

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1991

LARRY GRIFFIN,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. 91-_____
	)	
PAUL DELO,	)	
	)	
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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-2377

Larry Griffin,	*	
	*	
Appellant,	*	
	*	Appeal from the
v.	*	United States
	*	District Court
	*	for the Eastern
Paul Delo,	*	District of
	*	Missouri.
	*	[PUBLISHED]
Appellee.	*	

Submitted: June 13, 1991

Filed: April 14, 1992

Before BEAM and FLOYD R. GIBSON, Circuit Judges and URBOM,[1] Senior District Judge.

PER CURIAM.

We grant the petition for rehearing filed by the appellant, vacate our

[1]The HONORABLE WARREN K. URBOM, Senior United States District Judge of the District of Nebraska, sitting by desination.

prior opinion, and file this opinion as our amended judgment.

Larry Griffin appeals the district court's denial of his petition for a writ of habeas corpus under 28 U.S.C. § 2254. Griffin initially argued for reversal on grounds that (1) he was denied due process, (2) he received ineffective assistance of counsel at trial, and (3) he was denied his right to confront an adverse witness. We affirmed the district court's denial of the petition.

The petitioner has now filed a pro se petition for rehearing, arguing that he was denied effective assistance by appointed counsel at trial and on direct appeal. In addition, he contends that counsel appointed to represent him during post-conviction and federal habe-

as proceedings failed to provide effective assistance. The latter counsel sought, and was granted, leave to withdraw.

New counsel was appointed and has now raised claims of constitutional violations during trial and appeal which may have merit and, therefore, warrant further review. We remand to the district court with directions that appellant be permitted to raise the new claims asserted in the request for rehearing.

Appellant's first appointed counsel represented him during trial and on direct appeal. A second attorney was appointed for post-conviction proceedings and was reappointed for federal habeas proceedings. A third attorney now represents appellant following the

withdrawal of prior counsel. According to appellant, the second attorney failed to provide effective assistance at both the post-conviction and habeas proceedings (1) by inadequately presenting and arguing issues before this court, and (2) by failing to recognize and raise a number of valid constitutional issues apparent from the record. Appellant makes specific note of several examples of this alleged ineffectiveness but does not attempt to provide an exhaustive list of such instances.

We do not reach the merits of the appellant's assertions. We find it sufficient to say that counsel may not have recognized and presented issues of constitutional dimension during the post-conviction and habeas proceedings. Counsel may have also failed to

adequately bolster claims actually raised. In light of the death sentence under which appellant labors and our granting of permission for his second attorney to withdraw, we believe that a remand with directions to allow the petitioner to raise additional issues for consideration by the district court is the most prudent course.

We conclude that appellant should have a reasonable opportunity to present his claims of constitutional error, subject, of course, to all claims and defenses available to the appellee. Accordingly, we retain jurisdiction of this matter, vacate the order of the district court and remand for further proceedings consistent with this opinion. The district court shall, within 180 days, consider new claims, defenses and certify its final

consideration of this matter to this court.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-2377

Larry Griffin,	*	
	*	
Appellant,	*	
	*	Appeal from the
vs.	*	United States
	*	District Court
	*	the Eastern
Paul Delo,	*	District of
	*	Missouri.
Appellee.	*	[PUBLISHED]

Submitted: June 13, 1991
Filed: February 3, 1992

Before BEAM and FLOYD R. GIBSON, Circuit Judges and URBOM,[1] Senior District Judge.

PER CURIAM.

We grant the petition for rehearing filed by the appellant, vacate our prior opinion, and file this opinion as our amended judgment.

[1]The HONORABLE WARREN K. URBOM, Senior United States District Judge for the District of Nebraska, sitting by designation.

Larry Griffin appeals the district court's denial of his petition for writ of habeas corpus under 28 U.S.C. § 2254. Griffin initially argued for reversal on grounds that (1) he was denied due process, (2) he received ineffective assistance of counsel at trial, and (3) he was denied his right to confront an adverse witness. We affirmed the district court's denial of the petition.

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sought, and was granted, leave to withdraw.

New counsel was appointed and has now raised claims of constitutional violations during trial and appeal which may have merit and, therefore, warrant further review. We remand to the district court with directions that appellant be permitted to raise the new claims asserted in the request for rehearing.

Appellant's first appointed counsel represented him during trial and on direct appeal. A second attorney was appointed for post-conviction proceedings and was reappointed for federal habeas proceedings. A third attorney now represents appellant following the withdrawal of prior counsel. According to appellant, the second attorney

failed to provide effective assistance at both the post-conviction and habeas proceedings (1) by inadequately presenting and arguing issues before this court, and (2) by failing to recognize and raise a number of valid constitutional issues apparent from the record. Appellant makes specific note of several examples of this alleged ineffectiveness but does not attempt to provide an exhaustive list of such instances.

We do not reach the merits of the appellant's assertions. We find it sufficient to say that counsel may not have recognized and presented issues of constitutional dimension during the post-conviction and habeas proceedings. Counsel may have also failed to adequately bolster claims actually raised. In light of the death sentence

under which appellant labors and our granting of permission for his second attorney to withdraw, we believe that a remand with directions to allow the petitioner to raise additional issues for consideration by the district court is the most prudent course.

We conclude that appellant should have a reasonable opportunity to present his claims of constitutional error, subject, of course, to all claims and defenses available to the appellee. Accordingly, we vacate the order of the district court and remand for further proceedings consistent with this opinion.

A true copy.

Attest:

CLERK, U. S. COURT OF
APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-2377

Larry Griffin,	*	
	*	
Appellant,	*	
	*	Appeal from the
vs.	*	United States
	*	District Court
	*	the Eastern
Paul Delo,	*	District of
	*	Missouri.
Appellee.	*	

Submitted: June 13, 1991

Filed: October 11, 1991

Before BEAM and FLOYD R. GIBSON, Circuit Judges, and URBOM[1], Senior District Judge.

URBOM, Senior District Judge.

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[1]The Honorable Warren K. Urbom, United States Senior District Judge for the District of Nebraska, sitting by designation.

Larry Griffin appeals from a judgment of the district court[2] denying his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. We affirm.

Griffin was convicted of capital murder pursuant to § 565.001 R.S.Mo. (1978) and was sentenced to death. The Supreme Court of Missouri affirmed the conviction and sentence on appeal. State v. Griffin, 662 S.W.2d 854 (Mo. banc 1983), cert. denied, 469 U.S. 873 (1984). Griffin's motion for post-conviction relief was denied. Griffin v. State, 748 S.W.2d 756 (Mo. App. 1988). His petition for federal habeas corpus relief pursuant to 28 U.S.C. § 2254 was

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[2]The Honorable Edward L. Filippine, United States District Judge for the Eastern District of Missouri.

denied by Judge Filippine, who adopted the magistrate judge's report and recommendations.[3]

Arguing for reversal, Griffin states that (1) he was denied due process by the admission of testimony from the victim's mother regarding telephone threats she purportedly received, (2) he received ineffective assistance of counsel when his attorney failed to object to the threat testimony and failed to contact, interview, or call a certain witness, (3) he was denied his right to confront an adverse witness when the trial court admitted hearsay testimony, and (4) he was denied due

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[3]The Honorable David C. Noce, United States Magistrate Judge for the Eastern District of Missouri.

process when the prosecutor knowingly used perjured hearsay testimony.

I. Threat Testimony

At the trial the state called the victim's mother as a witness to testify that she received anonymous threats over the telephone prior to her son's death. State v. Griffin, 662 S.W.2d 854, 859 (Mo. banc 1983). These threats were never directly or indirectly linked to the appellant.

Two independent grounds exist for affirming the district court's disposition of this claim. The procedural ground is that there was no timely objection at the trial and no request to strike the testimony, whereupon the petitioner has defaulted on this claim. Benson v. State, 611 S.W.2d 538

(Mo. app. 1980). Accordingly, the petitioner cannot receive federal habeas corpus relief unless he shows both cause and actual prejudice for his procedural default. Wainwright v. Sykes, 433 U.S. 81 (1977); Engle v. Isaac, 456 U.S. 107 (1982). Neither cause nor actual prejudice has been shown or attempted to be shown.

The substantive ground for denying relief is that admissibility of evidence is a matter of state law and generally does not give rise to constitutional error subject to redress in a federal habeas corpus case. Harrison v. Dahm, 880 F.2d 999, 1001 (8th Cir. 1990). An evidentiary question is reviewable "only when the alleged error infringes a specific constitutional right or is so grossly or conspicuously prejudicial that it fatally infected

the trial and denied petitioner fundamental fairness." Ford v. Armontrout, 916 F.2d 457, 460 (8th Cir. 1990), cert. denied, 111 S.Ct. 1594 (1991). The appellant has failed to show that the admission of the victim's mother's testimony was so egregious as to have infected the entire trial fatally and thereby make it fundamentally unfair. Hamilton v. Nix, 809 F.2d 463, 470 (8th Cir. 1960), cert. denied, 483 U.S. 1023 (1987). This ground for relief is without merit.

II. Ineffective Assistance of Counsel

Appellant contends that he received ineffective assistance of counsel when his trial counsel failed to object to the victim's mother's testimony concerning telephone threats she received prior to her son's death. We

disagree. The record discloses a proper and timely objection was not made by appellant's counsel, nor was a proper motion to strike made of the answer. Griffin, 662 S.W.2d at 859. However, on a motion for rehearing the Missouri Court of Appeals found that it need not address the claim of ineffective assistance of counsel, because the appellant failed to show how he was prejudiced. Griffin, 748 S.W.2d at 761. A claim of ineffective assistance of counsel is reviewed under the two-prong standard of Strickland v. Washington, 466 U.S. 668 (1984). First, the appellant must demonstrate that counsel's performance was deficient, and second, that such deficient performance prejudiced the appellant's defense. Id. at 687; Williamson v. Jones, 936 F.2d 1000, 1004 (8th Cir. 1991).

As to the first prong, there must be a showing that the attorney did not render reasonably effective assistance. Strickland, 466 U.S. at 687-88. In conducting such a review we "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689. The second prong requires appellant to demonstrate with reasonable probability that "but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694.

The Missouri Court of Appeals found that appellant's trial counsel had filed a motion in limine to exclude the victim's mother's testimony regarding the threats and that the motion was

denied. Griffin, 748 S.W.2d at 761.[4] Moreover, no evidence was ever presented to link appellant to the threats. Id. Given those facts, even if counsel failed to object to the testimony at trial, we find that his performance amounted to reasonable trial strategy, was not deficient, and no prejudice has been shown.

The appellant further alleges ineffective assistance of counsel because his attorney failed to contact, inter-

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[4]By a pro se letter dated August 5, 1991, the petitioner has said that the finding by the Missouri Supreme Court was in error, because "A search of the legal file reflects that a motion in limine was filed on June 22, 1981, this pleading did not address this issue in any form." Title 28, § 2254(d) requires that we presume the finding of the state court to be correct unless one of eight conditions obtains. None of those conditions has been shown to exist.

view, or call Robert Campbell as a witness who could allegedly refute damaging testimony of other witnesses. However, as explained below, the reasonable strategic and tactical decisions made by trial counsel cannot be the basis for finding ineffective assistance of counsel. Strickland, 466 U.S. at 690-691.

The trial strategy of the appellant's counsel was revealed at an evidentiary hearing, where he testified that the appellant's defense was one of alibi and more likely to succeed by keeping Campbell out of the courtroom with a motion in limine, but the motion was denied. Griffin, 748 S.W.2d at 759. It was counsel's opinion that Campbell's testimony could only implicate the appellant in an earlier attempt on the victim's life. Id. at

758. In that earlier incident in which Campbell was shot, he identified the vehicle from which his assailant alighted as one in which Griffin was soon thereafter apprehended. Id. Given such circumstances, trial counsel's actions in attempting to keep Campbell out of the courtroom were clearly trial strategy of a reasonable nature, and we find that counsel's assistance was not ineffective.

III. Confrontation of Witnesses

The appellant argues that the district court erred in finding that appellant was not denied his constitutional right under the sixth amendment to the United States Constitution to confront an adverse witness whose testimony was presented through admissible hearsay. We agree with the district court that

the appellant did not present that argument to the state courts for review. It is procedurally barred from review here.

The argument as raised on direct appeal to the Missouri Supreme Court was that the police officer's testimony "was irrelevant and its probative value was outweighed by its inflammatory and prejudicial nature." State v. Griffin, 662 S.W.2d at 857. His argument before this court is that his constitutional right of confrontation was denied by the receipt of that testimony. The two theories are not the same, and the substance of the appellant's federal habeas corpus claim was not previously presented to the state courts. See Buckley v. Lockhart, 892 F.2d 715, 719 (8th Cir. 1989), cert. denied, 110 S.Ct. 3243 (1990). The appellant has

made no showing of any cause for the default or actual prejudice and the claim is procedurally barred. Wainwright v. Sykes, 433 U.S. 72 (1977).

IV. Due Process

The last claim is that the district court erred in finding no denial of due process by the prosecutor's use of testimony allegedly known to be false. The appellant asserts that the prosecutor used hearsay statements of police officers to determine that Robert Campbell, after being shot, identified the appellant as his assailant, and purposefully did not call Campbell as a witness because the prosecutor knew his testimony would contradict the police officers' testimony. While a conviction obtained by the knowing use of perjured testimony is fundamentally

unfair, United States v. Agurs, 427 U.S. 97, 103 (1976), a challenge to evidence through another witness or prior inconsistent statements is insufficient to establish prosecutorial use of false testimony. United States v. White, 724 F.2d 714, 717 (8th Cir. 1984), cert. denied, 489 U.S. 1029 (1989) (citing with approval United States v. Sutherland, 656 F.2d 1181, 1203 (5th Cir. 1981), cert. denied, 455 U.S. 949 (1982)).

Griffin's allegation as to what Campbell's testimony would have been, had he testified, is wholly conjecture. The hearsay testimony in question was clearly admissible under the excited utterance exception and, therefore, bore a degree of trustworthiness. The prosecutions' use of the police officers' hearsay testimony was

not fundamentally unfair to the appellant. Furthermore, appellant has failed to show that the testimony was known to have been false or that the prosecutor's conduct was so egregious in the context of the entire trial that it rendered the trial fundamentally unfair. We find no denial of due process.

Having fully examined all of the appellant's allegations of error, we conclude that the decision of the district court denying habeas relief was correct.

Accordingly, we affirm the order of the district court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,

EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

LARRY GRIFFIN,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 88-1074C(2)
	)	
PAUL DELO,	)	
	)	
Respondent.	)	

MEMORANDUM AND ORDER

This matter is before the Court on the petition of Larry Griffin for a writ of habeas corpus. The matter was referred to United States Magistrate David D. Noce, who has filed his Report and Recommendation. 28 U.S.C. § 636(b). Petitioner and respondent[1] have filed objections thereto.

After careful consideration and a de novo review, the Court has decided

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[1]Paul Delo, the Superintendent of the Potosi Correctional Center, is now the proper party respondent.

to adopt the Report and Recommendation as modified herein.

Magistrate Noce determined that petitioner's third ground for relief is without merit. The Court agrees with that conclusion; however, the Court does not agree with the Magistrate that there was overwhelming evidence linking petitioner to the crime in question.[2] Instead, this Court finds that the evidence against petitioner was substantial. In all other respects, Magistrate Noce's conclusions on this point are adopted.

Accordingly,

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[2]The Court is aware that the Missouri Court came to different conclusion. See **State v. Griffin**, 662 S.W.2d 854, 858 (Mo. banc 1983) ("Admittedly, the facts here do not present the strongest possible case").

IT IS HEREBY ORDERED that the Report and Recommendation of the United States Magistrate is **SUSTAINED** and **ADOPTED** as modified herein.

An appropriate order shall accompany this memorandum and order.

Dated this 16th day of July, 1990.

--Edward L. Filippine--

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

LARRY GRIFFIN,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 88-1074C(2)
	)	
PAUL DELO,	)	
	)	
Respondent.	)	

JUDGMENT

In accordance with the Order filed this date and incorporated herein,

IT IS HEREBY ORDERED, ADJUDGED and **DECREED** that respondent Paul Delo shall have judgment against petitioner, Larry Griffin, and the petition of Larry Griffin for habeas corpus relief is **DISMISSED** with prejudice.

IT IS FURTHER ORDERED that the stay entered by this Court on June 3, 1988, shall continue in effect for thirty days from the date of this Order to allow for the timely filing by petitioner of a notice of appeal.

Dated this 16th day of July, 1990.

--Edward L. Filippine--

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

LARRY GRIFFIN,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 88-1074C(2)
	)	
PAUL DELO,	)	
	)	
Respondent.	)	

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE

This cause is before the Court on the petition of Missouri state prisoner Larry Griffin for a writ of habeas corpus under 28 U.S.C. §2254. This matter was referred to the undersigned United States Magistrate for review and a recommended disposition. 28 U.S.C. §636(b).

On June 26, 1981, Larry Griffin was convicted of the capital murder of Quintin Moss by a jury in the Circuit Court of the City of St. Louis. On August 7, 1981, he was sentenced to death. The conviction was affirmed on

appeal by the Missouri Supreme Court. State of Missouri v. Griffin, 662 S.W.2d 854 (Mo. banc 1983). Griffin thereafter sought post-conviction relief in the Missouri courts pursuant to then Missouri Supreme Court Rule 27.26 (repealed, effective January 1, 1988). (Resp. Exh. F, G.) The Rule 27.26 hearing court denied Griffin's motion, and its denial of post-conviction relief was affirmed on appeal. Griffin v. State of Missouri, 748 S.W.2d 756 (Mo. App. 1988).

On June 3, 1988, Griffin filed the instant petition for federal habeas corpus relief pursuant to 28 U.S.C. §2254. On that same date, the District Court issued a stay of execution pending resolution of the petition. On January 26, 1989, Griffin was allowed to substitute appointed counsel of his

choice as well as leave to file an amended petition.

On March 3, 1989, Griffin filed his amended petition. He asserts 17 grounds for relief:

1. He was denied his right to confront adverse witnesses when the trial court admitted allegedly hearsay testimony;

2. he received ineffective assistance of counsel because his trial counsel failed to contact, interview, or obtain as a witness Robert Campbell;

3. he was denied due process when the trial court admitted testimony from the victim's mother regarding threats received prior to her son's death;

4. he received ineffective assistance of counsel because his trial counsel failed to object to the testimony outlined in ground 3;

5. he was denied due process when the trial court instructed the jury that petitioner could be convicted as a co-participant in the murder although he did not act, assist or was involved in said killing in any manner;

6. he received ineffective assistance of counsel when his trial counsel failed to object to the jury instruction at issue in ground 5 or preserve the issue for appeal;

7. he received ineffective assistance of counsel because his trial counsel failed to present any mitigating evidence at the punishment phase of the trial;

8. he received ineffective assistance of counsel because his trial counsel failed to properly question the jury panel regarding imposition of the death penalty;

9. he received ineffective assistance of counsel because trial counsel failed to attempt to rehabilitate jury panel members disqualified because of opposition to the death penalty;

10. he received ineffective assistance of counsel because his trial counsel failed to investigate his alibi defense;

11. he received ineffective assistance of counsel because his trial counsel failed to advise him of his right to testify during the penalty phase of the trial;

12. he was denied due process when the prosecutor used perjured hearsay testimony;

13. he received ineffective assistance of counsel because of "the cumulative effect of . . . trial counsel's errors";

14. he was denied equal protection and due process by the admission of evidence concerning his prior criminal conduct;

15. he received ineffective assistance of counsel because his counsel failed to object to the prosecutor's prejudicial characterization of him;

16. he was denied equal protection and due process because the sole aggravating circumstance in his case was applied in an overbroad manner thus permitting an arbitrary and capricious imposition of the death penalty; and

17. the death sentence "was imposed under the influence of passion, prejudice and other arbitrary factors", thus violating his Eighth Amendment protection from cruel and unusual punishment.

Petitioner argues that he is entitled to an evidentiary hearing on his federal habeas grounds. To be entitled to an evidentiary hearing, Griffin must establish one of the eight conditions for an evidentiary hearing set forth in 28 U.S.C. §2254(d). Griffin has failed to meet this requirement. A federal court may dismiss a habeas petition without an evidentiary hearing where the allegations are frivolous, where the allegations fail to state a consti-

tutional claim, where the relevant facts are not in dispute, or where the dispute can be resolved on the basis of the record. Urquhart v. Lockhart, 726 F.2d 1316, 1318-19 (8th Cir. 1984); Wallace v. Lockhart, 701 F.2d 719, 729-30 (8th Cir.), cert. denied, 464 U.S. 934 (1983). Because of the conclusions reached herein, an evidentiary hearing in this matter is not required.

Respondent concedes that Griffin has exhausted grounds 2, 4, 7, 8, and 16. Respondent asserts, however, that Griffin's grounds 3 and 17 fail to raise any federal constitutional claim that can be addressed in this proceeding. Respondent also argues that Griffin has failed to present grounds 1, 3, 5, 6, and 9 through 15 in the state courts in the procedurally proper manner and cannot do so now. Absent a demonstration of cause and prejudice,

respondent contends, these grounds are barred from consideration by a federal court in a habeas proceeding under Wainwright v. Sykes, 433 U.S. 72 (1977).

I. **Procedural Issues.**

Respondent contends that Griffin's third and seventeenth grounds fail to raise any constitutional claim, but rather raise only issues of state law. In his ground 3, Griffin alleges that his due process rights were violated by the trial court's admission of testimony from the victim's mother, Missouria Moss, concerning anonymous telephone threats received by her prior to her son's death. These threats were never directly or indirectly linked to Griffin. (Resp. Exh. A, at 48-52, 58-59.)

Although petitioner acknowledges that the admissibility of evidence is generally a matter of state law, he

contends that federal habeas relief is required "when an erroneous evidentiary ruling 'is of such magnitude that the result is a denial of fundamental fairness.' United States ex rel. Palmer v. DeRobertis, 738 F.2d 168, 170 (7th Cir.), cert. denied, 469 U.S. 924 . . . (1984)." (Traverse, filed June 19, 1989, at 9.) An erroneous ruling on state evidentiary law by a state court is not a cognizable ground for relief in a federal habeas proceeding when no violation of due process or another constitutional right is shown to have occurred. Urquhart v. Lockhart, supra, 726 F.2d at 1318; Harrison v. Dahm, No. 88-2596, slip op. at 4-5 (8th Cir. July 27, 1989). A federal court may not intervene in state judicial processes except to correct wrongs of a constitutional dimension. Wainwright v. Goode, 464 U.S. 78, 83 (1983) (per curiam).

Therefore, Griffin must demonstrate that the complained of error denied him fundamental fairness in his trial to state a claim cognizable under §2254. Warden v. Wyrick, 770 F.2d 112, 116 (8th Cir.), cert. denied, 474 U.S. 1035 (1985).

At Griffin's trial, a police officer testified that petitioner was seen shortly before the murder near the murder site in the vicinity of someone who was carrying what appeared to be a shotgun. (Resp. Exh. A, at 196-99.) Another witness testified that he had witnessed the murder, had a clear view of Griffin firing a weapon at the victim, and had provided a description and the license plate number of the vehicle used by Griffin and his co-participant. (Id., at 77-91). This description of the suspects' vehicle lead police to find a 1968 Chevrolet contain-

ing a carbine rifle, a pistol, ammunition, a red and white baseball cap and a court receipt bearing the name of "Reginald Griffin," the petitioner's cousin. (Id., at 162-73.) Subsequent expert testimony established that the carbine had fired a bullet fragment found at the murder scene. A .38 bullet fragment also found at the murder scene was of the same general type used in the revolver found in the abandoned Chevrolet. (Id., at 208-21.)

In view of the overwhelming evidence against Griffin at trial, the admission of the challenged testimony, if if was error, did not infringe a specific constitutional right and was not so prejudicial as to deny Griffin due process. Urquhart, supra, 726 F.2d at 1318; Harrison, supra, slip op. at 4-5. Griffin's ground 3 should there-

fore be dismissed with prejudice by the Court.[1]

Griffin's thirteenth ground also fails to state a cognizable claim for federal habeas relief. In this ground, Griffin asserts that the cumulative effect of all of his trial counsel's errors amounted to ineffective assistance of counsel. However, each ground for relief under §2254 must stand or fall on its own. Byrd v. Armontrout, 686 F.Supp. 743, 784 (E.D. Mo. 1988), aff'd, No. 88-1903, slip op. at 17 (8th Cir. June 27, 1989). Griffin cannot succeed by accumulating several ineffective assistance of counsel claims into one, overarching allegation. Rather,

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[1]Because of this conclusion, respondent's contention that this claim is subject to a procedural bar will not be addressed.

each habeas claim "must stand on its own." Byrd v. Armontrout, No. 88-1903, slip op. at 17 (8th Cir. June 27, 1986). This ground should be dismissed with prejudice.

Despite Griffin's invocation of the Eighth Amendment, the undersigned concludes that his ground 17 also fails to raise a cognizable claim in this proceeding. Griffin's claim that the penalty imposed was "a product of passion, prejudice, and other arbitrary factors" is a state-law claim which has already been addressed by the Missouri Supreme Court. State of Missouri v. Griffin, supra, 662 S.W.2d at 859-60. Even the dissent found "no indication that the jury acted out of passion or prejudice . . .." Id., at 863 (Blackmar, J., dissenting). Furthermore, if Griffin is arguing that his sentence was disproportionate to the

offense committed, the undersigned notes that he cannot, in this proceeding, relitigate the proportionality review performed by the Missouri Supreme Court. See, Pulley v. Harris, 465 U.S. 37, 50-51 (1984). This claim should also be dismissed with prejudice by the Court.

Respondent next contends that Griffin's first ground for relief is unexhausted, because it was not fairly presented to the state courts. Respondent further argues that a successive motion for post-conviction relief cannot now be filed because Missouri Supreme Court Rule 29.15 (replacing Rule 27.26) expressly prohibits successive motions. Thus, respondent contends, Griffin's ground 1 for relief is subject to an adequate and independent state procedural bar to federal re-

view. Wayne v. Wyrick, 735 F.2d 324, 325 (8th Cir. 1984) (per curiam).

The record reflects that Griffin raised a similar, albeit not identical, claim in his motion for a new trial (Resp. Exh. B, at 16-17). However, Griffin failed to raise this ground or one similar to it on appeal either with respect to the testimony of Officer Murphy or Officer Frederickson (Resp. Exh. C). He also failed to address this ground during his Rule 27.26 litigation (Resp. Exh. G, H, I and J.) Petitioner claims that this issue was raised in his Rule 27.26 litigation and addressed by the Rule 27.26 hearing court. (Resp. Exh. G, "Judge Peek's Ruling," at 4-6). However, there Griffin only alleged that his trial counsel rendered ineffective assistance by failing to interview and secure as a witness Robert Campbell. (Id.)

It is apparent from the record that the state courts were denied the opportunity to consider petitioner's ground for relief. Until June 30, 1988, petitioner could have moved to set aside his conviction pursuant to Missouri Supreme Court Rule 29.15(1). However, he failed to utilize this procedure prior to that date. Petitioner cannot now raise his ground in the state courts by way of a post-conviction motion, and there is no other state remedy available to him for this ground. Barks v. Armontrout, No. 88-1960, slip op. at 3-4 (8th Cir. June 29, 1988). This Court is, therefore, free to determine the merits of his first federal habeas ground absent deliberate bypass or default of state procedures. Fay v. Noia, 372 U.S. 391, 438 (1963); Wainwright, supra, 433 U.S. at 86-88.

Waivers affecting federal rights are federal questions to be determined under federal standards. Rodgers v. Wyrick, 621 F.2d 921, 927 (8th Cir. 1980). Where the waiver relates to trial events or was made by counsel in petitioner's behalf, the cause and prejudice standard applies. Id. This standard applies even to a failure to raise an issue on direct appeal. Worthan v. Wyrick, 805 F.2d 303, 305 (8th Cir. 1986), cert. denied, 481 U.S. 1019 (1987), citing, Murray v. Carrier, 477 U.S. 478, 490-92 (1986).

Because petitioner's first federal habeas ground was not fairly presented to the state courts, nor can it now be, the Court must determine whether petitioner can demonstrate (1) "adequate cause to excuse his failure to raise the claim in state court properly", and if he can show such cause, then he must

also show (2) "actual prejudice to his defense resulting from the state court's failure to address the merits of the claim." Smittie v. Lockhart, 843 F.2d 295, 296 (8th Cir. 1988).

Petitioner has not alleged nor demonstrated any reason for his default. (Petitioner's reply brief, at 13-18). As a result, this Court may not address the merits of the claim. In order to fairly present a claim to the state courts, "the petitioner must have informed the state court of both the factual and the legal premises of the claim he asserts in federal court." Daye v. Attorney General of State of New York, 696 F.2d 186, 191 (2d Cir. 1982) (en banc), cert. denied, 464 U.S. 1048 (1984) (emphasis in original). This is required so that the state courts may apply the controlling legal principles to the facts bearing

upon Griffin's federal constitutional claim. Picard v. Connor, 404 U.S. 270, 277-78 (1971).

Griffin's Rule 27.26 appellate counsel's failure to raise the claim on appeal does not constitute "cause," because the "cause" necessary to overcome the procedural bar is "cause" that would be in itself an independent ground justifying habeas corpus relief. See, Murray v. Carrier, supra, 477 U.S. at 489; Leggins v. Lockhart, 822 F.2d 764, 768 n.5 (8th Cir. 1987), cert. denied, 108 S.Ct. 1080 (1988); cf., Stokes v. Armontrout, 851 F.2d 1085, 1092 n.8 (8th Cir. 1988), cert. denied, 109 S.Ct. 823 (1989). A claim of ineffective assistance of Rule 27.26 hearing or appellate counsel cannot be an independent ground for federal habeas relief. See, Williams v. State of Missouri, 640 F.2d 140, 143-44 (8th

Cir.), cert. denied, 451 U.S. 990 (1981); Mitchell v. Wyrick, 727 F.2d 773, 774 (8th Cir.), cert. denied, 469 U.S. 823 (1984). In sum, Griffin's ground 1 should be barred from federal habeas review.

Next, respondent argues that Griffin's grounds 5 and 6 are also procedurally barred from habeas review. In ground 5, Griffin alleges that he was denied due process when the trial court instructed the jury (Instruction No. 6) that he could be convicted as a co-participant in the murder even though he did not act, assist or was involved in said killing in any manner. Ground 6 alleges that Griffin received ineffective assistance of counsel by failing to object to Instruction No. 6 or to preserve the issue for appeal.

Despite respondent's argument that these grounds are subject to a procedural bar, there is no procedural bar to proceeding directly to the merits of meritless claims and dismissing them for this reason. Thompson v. Jones, 870 F.2d 432, 434 (8th Cir. 1988). Griffin's fifth ground is wholly without merit. Instruction No. 6 states:

If you find and believe from the evidence beyond a reasonable doubt:

> First, that on or about June 26, 1980, in the City of St. Louis, State of Missouri, the defendant or another person caused the death of Quintin Moss by shooting him, and
>
> Second, that the defendant and another person intended to take the life of Quintin Moss, and
>
> Third, that the defendant and another person knew that they were practically certain to cause the death of Quintin Moss, and
>
> Fourth, that the defendant and another person considered taking the life of Quintin Moss and reflected upon this

matter coolly and fully before doing so,

then you are instructed that the offense of capital murder was committed, and if you further find and believe from the evidence beyond a reasonable doubt:

Fifth, that in the commission of such offense the defendant acted with such other person with the purpose of committing that offense.

then you will find the defendant guilty of capital murder.

However, if you do not find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of the offense.

(Resp. Exh. B, at 31). It is readily apparent that this jury instruction did not permit Griffin to be convicted without any involvement in the killing of the victim as he alleges. Ground 5 should be denied on the merits.

In ground 6, Griffin contends that his trial attorney was ineffective because he failed to object to Instruction 6. However, the Missouri Supreme

Court held that there was no error in the trial court's use of this instruction. State of Missouri v. Griffin, supra, 662 S.W.2d at 857. A federal court in a habeas corpus proceeding is bound by an interpretation of state law by the highest court of a state. See, Harkins v. Wyrick, 589 F.2d 387, 391 (8th Cir. 1979). The Missouri Supreme Court having held that the jury instruction was not submitted in error, Griffin cannot demonstrate that his trial counsel was ineffective because he did not object to its submission or preserve the issue for appeal. This ground should also be denied as being without any merit.

In ground 9, Griffin argues that his trial counsel rendered ineffective assistance because he failed to attempt to rehabilitate the jury panel members disqualified because of their opposi-

tion to the death penalty. This ground was not raised on direct or collateral appeal.[2] Griffin has failed to explain cause for his procedural default or to demonstrate how he has suffered actual prejudice. Smittie, supra, 843 F.2d at 296. This ground should therefore be procedurally barred from federal habeas review.[3]

Respondent next argues that Griffin's grounds 10, 11, and 12 are all procedurally barred from federal habeas review because they were not

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[2]Griffin did raise another claim regarding the voir dire process in his Rule 27.26 appeal. (Resp.Exh. H, at 3, 9-10, 23). However, that claim is the instant ground 8.

[3]An identical argument was rejected in Straight v. Wainwright, 772 F.2d 674, 680 (11th Cir. 1985), cert. denied, 475 U.S. 1099 (1986). Therein, the Eleventh Circuit found no merit to this argument.

presented to a state appellate court for review. The undersigned disagrees. Griffin's federal habeas grounds 10, 11 and 12 were presented to the Missouri Court of Appeals, Eastern District, on Griffin's Rule 27.26 appeal. (Resp. Exh. H, at 3; I, at 14.) Therefore, these claims will be addressed on their merits below.

In his fourteenth ground for habeas relief, Griffin argues that he was denied equal protection and due process by the trial court's admission of evidence of his alleged prior criminal conduct and the prosecutor's "repeated innuendo of [his] evil character" to establish a probability of guilt. Respondent contends that this ground also is procedurally barred from federal court review. This ground was not raised on direct or collateral appeal. Griffin has not explained cause to the

Court for his procedural default nor demonstrated how he has suffered actual prejudice. Smittie, supra, 843 F.2d at 296. Ground 14 should thus be procedurally barred from federal habeas review.

Finally, respondent contends that Griffin's fifteenth ground is procedurally barred from federal habeas review as well. In this ground, Griffin alleges that his trial counsel rendered ineffective assistance in failing to properly object to a prosecution witness' characterization of him as a "police character." This ground was also not presented to the state courts for review either on Griffin's direct or appellate appeal. Petitioner has offered no explanation for his procedural default. This ground should therefore be barred from review in this proceeding.

II. **Discussion of the Merits.**

Of Griffin's 14 cognizable federal habeas claims, eight have been exhausted in the state courts and are open to review by this Court (grounds 2, 4, 7, 8, 10, 11, 12 and 16). Habeas corpus relief is available on petitioner's ineffectiveness of counsel claims, if it is shown that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984). A habeas petitioner must first demonstrate that counsel's performance fell below an objective standard of reasonableness. Id., at 687-88. In this regard, petitioner must overcome a strong presumption that counsel has rendered effective assistance. Id., at 690; Blackmon v. White, 825 F.2d 1263, 1265 (8th Cir. 1987). Counsel's strategic

choices made after thorough investigation are virtually unchallengeable, and decisions following less thorough, but nevertheless reasonable, investigation are to be upheld to the extent that they are supported by reasonable professional judgment. Strickland, supra, 466 U.S. at 690-91.

Second, in order to prevail on an ineffective assistance of counsel claim, a habeas petitioner must demonstrate prejudice resulting from counsel's dereliction of duty. Id., at 687. This requires a showing that, but for counsel's deficient performance, there exists a reasonable probability that the outcome of the case would have been different. Id., at 694.

Griffin's second federal habeas claim alleges that his trial attorney was ineffective because he failed to contact, interview, question or call

Robert Campbell as a witness. Griffin contends that had Campbell testified, he would have refuted Officer Murphy's testimony concerning Campbell's alleged statements linking Griffin to a previous attempted murder of the victim, Quintin Moss. This claim was raised in Griffin's Rule 27.26 litigation. The Rule 27.26 trial and appellate courts made factual findings concerning this ground for relief. (Resp. Exh. G, at 4-6; Resp. Exh. J, at 2-6.) The factual findings of the state court are entitled to the presumption of correctness established in 28 U.S.C. §2254(d) so long as these findings are fairly supported by the record. Wainwright v. Goode, supra, 464 U.S. at 85. The presumption applies only to historical facts, however, not to the mixed issue of whether petitioner received ineffective assistance of counsel. Kellogg v.

Scurr, 741 F.2d 1099, 1101 (8th Cir. 1984); see, Miller v. Fenton, 474 U.S. 104, 110-12 (1985).

The Missouri Court of Appeals made the following relevant factual findings:

> . . . Campbell was the unintended victim of a prior attempt on Moss' life. On May 13, 1980 police responded to a report of a shooting at Sarah and Olive streets. There they found a bleeding and dazed Robert Campbell. Quintin Moss was beside him. Campbell told police that a black over brown older Cadillac carrying two black males stopped. One of the occupants got out of the car and fired several shots, one of which struck Campbell in the leg. Within a half hour of that shooting police spotted [Griffin] and his nephew in a black over brown 1968 Cadillac three miles from the scene of the shooting.
>
> Campbell did not testify at trial but his statements concerning the May 13 incident were introduced via the testimony of the officers who arrived at the scene of the shooting. [Griffin] now claims that had Campbell been called to testify at trial he could have refuted the testimony of the police officers and would have stated that he was unable to identify [Griffin] as the gunman. The hearing court found that the

actions of trial counsel were strategical decisions and as such were not a proper basis for finding trial counsel ineffective. We agree.

The attorney who represented the state at [Griffin's] trial testified at the evidentiary hearing that he sought to have Campbell testify to this prior attempt in order to prove scheme, knowledge, intent and premeditation in the later shooting of Moss. It was hoped that this testimony would also identify the defendant as the gunman in the later incident. It was the state's position that Campbell had told officers who arrived on the scene of the May 13 shooting that a black and brown Cadillac carrying two black males stopped at Sarah and Olive streets. One of the occupants alighted and fired several shots from a gun, one of which hit Campbell. After Campbell was transported to the hospital, the police brought the defendant to Campbell's hospital room for identification. Campbell expressed fear of Griffin and declined to identify him as the gunman. Campbell was subpoenaed to testify at the trial but prior to trial he told investigators that he feared Griffin and would leave the courtroom if needed to avoid testifying. After a diligent search, the prosecuting attorney was unable to locate Campbell the day of trial.

[Griffin's] trial counsel had represented [Griffin] on other matters in the past. At the evidentiary hearing counsel testified that from the time of [Griffin's] arrest until his trial, counsel met with [Griffin] in excess of twenty or twenty-five times. During the course of these meetings every detail of [Griffin's] case was discussed including the possible testimony of Robert Campbell. Counsel was aware of the existence and contents of the police reports concerning the May 13 shooting. In particular counsel was familiar with the substance of the statements made by Campbell to the police. Counsel stated, however, that he was unaware that Campbell had, at any time, expressed fear of [Griffin]. Counsel stated that he did not contact Campbell or seek to have him testify at trial for the following reasons:

> . . . [I]t was pretty clear from the reports that were given to us what their basic case outline was going to be. Our defense was one of alibi. And our pre-trial in terms of how specifically we would formulate our defense, our concerns with Mr. Campbell was [sic] keeping him out of the courtroom rather than bringing him in . . . . [I]t was my feeling or our feelings--whatever--that the best way to present the defense was to make it a clean and simple alibi

> defense. I felt that we had some very good, very strong witnesses on the alibi, and a good circumstantial basis for it. And what we were trying to do was to limit what I saw the State's efforts to make a nexxus [sic] of this whole common scheme. And what we were trying to do, and what we did pre-trial on the motions was to try and keep as much of this out on the basis that it had absolutely nothing to do with Larry [Griffin].

In furtherance of this strategy counsel filed a pre-trial motion in limine to exclude Campbell's testimony. That motion was overruled. However, defense counsel, in anticipation of this event, had prepared a fall-back position. Upon cross-examination defense counsel would attempt to elicit testimony from Campbell that he was unable to identify Griffin as the gunman in the May 13, 1980 shooting. However, none of these strategies came to fruition because, although he had been subpoenaed, Campbell could not be found on the day of trial and did not testify.

Campbell, some six years later, testified at the evidentiary hearing regarding the circumstances surrounding the May 13, 1980 shooting. While he stated that his back was toward the car carrying the gunmen, the bullet that struck him entered the

side of his right thigh, traversed it and went into his left thigh. Immediately after the shooting he was dazed and was taken to the hospital for treatment. While Campbell did not recall making any statements to the police regarding the car or its occupants he does not deny making any such statements.

Two police officers escorted two men to the hospital for possible identification, however, Campbell was unable to identify either as the gunman. Campbell stated that he did not know Griffin prior to the shooting and as a result had no reason to fear him. Campbell was not contacted by [Griffin's] attorney but was subpoenaed by the state to testify at trial. However, when he appeared on the day of trial he was told by a unidentified employee that he was no longer needed so he left. Campbell further stated that this would have been his testimony had he been called to testify at [Griffin's] trial.

[Griffin's] own testimony at the evidentiary hearing contradicts that of Campbell. [Griffin] testified that after the May 13 shooting he and his nephew were escorted by the police to the hospital where Campbell was receiving treatment. When asked what Campbell said in response to [Griffin's] presence in the hospital [Griffin] replied, "He said that we was the ones."

> [Griffin] testified that he told his attorney about this statement.

(Resp. Exh. J, at 3-6) (footnote omitted).

The reasonable strategic and tactical decisions of counsel may not serve as a basis for a finding of ineffective assistance. Strickland, supra, 466 U.S. at 690-91; Bell v. Lockhart, 741 F.2d 1105, 1107-09 (8th Cir. 1984). Griffin's counsel made a reasonable investigation as to this potential witness' probable testimony, understood the nature of the anticipated testimony and decided not to call Campbell as a witness. Indeed, defense counsel pursued an unsuccessful effort to keep Campbell from testifying and then prepared a line of cross-examination to minimize the expected damaging testimony. After a review of the entire record, the undersigned concludes that the Rule 27.26 appellate court's find-

ings of fact are fairly supported and that Griffin was not denied effective assistance of counsel as alleged in his second federal habeas ground.

Griffin next argues that his trial counsel rendered ineffective assistance because counsel failed to object to testimony from the victim's mother regarding threats she had received. This objection is without any merit. The record demonstrates that Griffin's trial counsel twice objected to this testimony at trial in an attempt to exclude it. (Resp. Exh. A, at 48-51). Griffin's fourth ground for federal habeas relief should be denied.

In his ground 7, Griffin contends that he received ineffective assistance of counsel because his trial counsel failed to present any mitigating evidence in Griffin's behalf during the punishment phase of the trial. This

claim was addressed by the Rule 27.26 appellate court. The Missouri Court of Appeals made the following relevant factual findings:

> In his second point [Griffin] avers that the [Rule 27.26] hearing Court erred when it declined to find trial counsel ineffective for failing to offer mitigating circumstances at the penalty phase of his trial. [Griffin] argues that "trial counsel should have recognized and submitted the most obvious mitigating circumstances which the jury could have considered in assessing punishment-the victim's implication in [Griffin's] brother's death." Failure to present this evidence along with counsel's failure to call family members to plead for his life, according to [Griffin], deprived him of effective assistance of counsel.
>
> At the evidentiary hearing trial counsel stated that there were no statutory mitigating circumstances available to him but recognized that he was free to present evidence beyond that listed in the statute. He recognized that he could have put on family members to make a plea for mercy. However, the defense was based on alibi and [Griffin] had maintained his innocence throughout his trial. Counsel felt that presenting such evidence would send a message to the jury that said "we have

> been lying to you all week, but give us a break." Counsel felt that such a maneuver would undermine the credibility that he had been trying to establish throughout the trial. [Griffin] testified that counsel had presented him with a list of statutory mitigating circumstances and he agreed with counsel that none of the statutory circumstances applied to his situation. When asked at the evidentiary hearing what information the jury should have heard about him that may have caused the jury not to recommend death[,] [Griffin] replied, "I don't know."

(Resp. Exh. J, at 8-9). These findings of the state court as to historical facts are fairly supported by the record and are entitled to §2254(d)'s presumption of correctness. Goode, supra, 464 U.S. at 85.

It is apparent that trial counsel, after reasonable investigation, made a deliberate strategic decision not to offer any evidence in mitigation of punishment at Griffin's trial. If trial counsel through neglect failed to discover mitigating evidence, he would

be found ineffective. Laws v. Armontrout, 863 F.2d 1377, 1384-86 (8th Cir. 1988). However, where mitigating evidence was not produced because counsel, after reasonable investigation and exercise of reasonable professional judgment, determined that withholding such evidence was the more strategically sound course, there is no constitutional violation. Id. The instant case meets the latter criteria and Griffin's trial counsel cannot be deemed ineffective for his decision not to present evidence in mitigation of punishment. Ground 7 should be denied on the merits.

Griffin's federal habeas ground 8 alleges that he received ineffective assistance of counsel because his "trial counsel was ineffective during the voir dire stage of trial in failing to question the jury panel whether they

would automatically impose a sentence of death after a finding of capital murder." (Amended petition, at 4.) In short, Griffin claims that his counsel was ineffective because he did not attempt to "life qualify" the jury panel. (Petitioner's Reply, at 21). Griffin argues that his counsel should have attempted to insure that potential jurors would not be "locked in" to the death penalty but would also consider a sentence of life imprisonment upon a finding of guilt.

The undersigned concludes that this argument has no merit. Prospective jurors were not asked by the state whether they would automatically impose the death penalty if Griffin was found guilty of capital murder. Rather, jurors were asked if they could consider the death penalty as an alternative within the range of punishment possible

if they were so instructed by the court after a finding of guilt. (Resp. Exh. J, at 9-10). Thus, the prosecution properly "death-qualified" the jury panel pursuant to Witherspoon v. Illinois, 391 U.S. 510 (1968). The only reason to have followed Griffin's suggested voir dire strategy would be to confuse prospective jurors. See Straight v. Wainwright, supra, 772 F.2d at, 680. Furthermore, Griffin has made no showing that any juror had a "closed mind" regarding the possible punishment. He, therefore, cannot demonstrate that he has suffered prejudice as required by Strickland, supra, 466 U.S. at 686. Ground 8 should be denied.

In his tenth ground for federal habeas relief, Griffin argues that he received ineffective assistance because his trial counsel failed to properly investigate Griffin's alibi defense.

This claim was raised in Griffin's Rule 27.26 litigation. (Resp. Exh. G, at 5, 9-10; H, at 3.) The Rule 27.26 hearing court made the following relevant factual findings concerning ground 10:

> [Griffin] informed Attorney Steiger that on the day of Quintin Moss's killing, he [Griffin] was with his brother-in-law, Gilbert Greenlee. Greenlee confirmed this during his testimony at trial. The day was significant because it was that day, June 26, 1980 that he was sold his canoe, through an ad in the "Tradin Times," (TR. 332), confirmed by reference to his calendar. Greenlee testified that he had sold the canoe at about 5:00 p.m. on the 26th and notified the people from "Tradin Times" the next day that he had sold it. (TR. 354).
>
> In rebuttal the State called a representative from the "Tradin Times" who testified that according to their records the call notifying them that the canoe had been sold came in on June 26, 1980 (TR 374), i.e., the day before Greenlee testified he reported the sale and the same day as the killing.
>
> [Griffin] contends his trial counsel was ineffective because he did not contact anyone from the "Tradin Times".

> The Court was unable to find anything in the record to indicate that Attorney Stieger was aware, prior to Greenlee's testimony in court that the latter had called "Tradin Times" the day after the sale to cancel his ad. Further there is no indication as to what effect knowledge of the "Tradin Times" records would have had on [Griffin's] defense of alibi.

(Resp. Exh. G, at 9-10.)

In neither his original or amended petition nor in his reply brief does Griffin offer any explanation as to what aspect of his alibi defense his trial counsel failed to investigate. Assuming that his contention is the same as the one he presented to the Rule 27.26 hearing court, the state court found that his attorney did not know until Greenlee testified that this witness would claim that he called the "Tradin Times" on June 26, 1980, allegedly the day after the sale of his canoe in an attempt to bolster Griffin's alibi. (Id.) This finding is support-

ed by the record and entitled to a presumption of correctness. Goode, supra, 464 U.S. at 85. However, even if Griffin's trial counsel was aware of this testimony prior to trial and failed to contact the "Tradin Times," the undersigned concludes that ineffective assistance was not rendered. The rebuttal testimony from the "Tradin Times" did not directly contradict Greenlee's alibi for Griffin on June 26, 1980; it only attacked Greenlee's credibility on the issue of when he reported the sale. Under these circumstances, the undersigned concludes that Griffin cannot demonstrate that he received ineffective assistance of counsel. Ground 10 should be denied.

Ground 11 alleges that his trial counsel rendered ineffective assistance by failing to advise him of his right to testify during the penalty phase of

his trial. This claim was presented to the state courts in Griffin's Rule 27.26 litigation. (Resp. Exh. G, at 5-6, 11-12; H, at 3). The Rule 27.26 hearing court made the following findings of fact regarding this allegation:

> [Griffin] testified that he asked his attorney to let him testify in the guilt phase of the trial but that Steiger told him that if he did, his prior convictions would be brought out and therefore it would not be in his best interest to testify. [Griffin] said that Steiger never told him that if he were found guilty of capital murder, his priors could be brought in during the penalty phase. He said had he known that he would have insisted on testifying during the guilt phase of his trial. On redirect examination [Griffin] said that if he knew then, what he knows now, he would have testified.
>
> However, on cross-examination [Griffin] stated that he could not say what information he would have offered if allowed to testify, only (later on re-cross) that he feels that if he had taken the stand he could have convinced the jury he was innocent. (Presumably despite the added burden of having his prior convictions introduced to impeach his credibility.)

> Mr. Steiger testified that he was aware that [Griffin's] priors could be brought out in the penalty phase but still felt his client should not testify.
>
> It is not even appropriate to say that "hind sight is 20-20" since in this case there is no way of knowing what, if any, effect [Griffin's] testimony would have had on the results in either phase of his trial. [Griffin] has not indicated what he would have said or how he feels it would have influenced the outcome.

(Resp. Exh. G, at 11-12). These findings of fact are fairly supported by the record and are thus entitled to §2254(d)'s presumption of correctness. Goode, supra, 464 U.S. at 85.

Griffin has failed to indicate in his Rule 27.26 proceedings or in his filings in this cause what he would have said had he testified during the penalty phase of his trial. He only contends that he would have belatedly convinced the jury he was innocent. This conclusory argument fails to demonstrate the prejudice required under

Strickland, supra. Therefore, this claim of ineffective assistance of counsel should be denied.

Next, Griffin contends that he was deprived of his right to due process because of prosecutorial misconduct during his trial. Specifically, Griffin alleges that the state declined to use the available testimony of Robert Campbell. Rather, the state is accused of using the "perjured" testimony of Officer Murphy to relate what Campbell had reportedly said regarding the previous assault upon Quintin Moss in which he (Campbell) was injured. This claim was presented to the state courts in Griffin's Rule 27.26 litigation. (Resp. Exh. G, at 7; H, at 18-19; I, at 14).

When a prosecutor engages in conduct that deprives the defendant of a fair trial, due process in violated.

Darden v. Wainwright, 477 U.S. 168, 180-81 (1986). Relief, however, is only available when the prosecutor's conduct is so egregious in the context of the entire trial that it renders the trial fundamentally unfair. See, e.g., Donnelly v. DeChristoforo, 416 U.S. 637, 645 (1974); Nassar v. Sissel, 792 F.2d 119, 122-123 (8th Cir. 1986).

This ground for relief has no merit. The record demonstrates that Campbell was available as a witness to the defense but that Griffin's trial counsel chose not to subpoena Campbell because the prosecution had already done so. However, the defense was not prohibited from subpoenaing a witness already subpoenaed by the state. Campbell was in fact subpoenaed but failed to appear at trial when called to testify. (Resp. Exh. F, at 33-34; J, at 5-6.) At petitioner's Rule 27.26 mo-

tion hearing, Campbell stated that he left the trial before testifying after "an unidentified court employee" told him that his testimony was no longer necessary.

Even should the Court assume that the prosecution was responsible for Campbell's unavailability as a witness and that the defense had detrimentally relied upon the prosecutions' subpoena of Campbell, Griffin's ground 12 should still be denied. Petitioner cannot demonstrate that this alleged act so infected his entire trial so as to render it fundamentally unfair. Campbell had earlier identified Griffin as the person who shot him in a prior attempt to kill Moss. Although Campbell stated at the Rule 27.26 hearing that he would not have identified Griffin as the assailant, this testimony was five years after the trial whereas his previous

statement identifying Griffin as the assailant was less that a year before the trial. Exactly how Campbell would have testified at trial is a matter of speculation, not fact. In any event, the other evidence of Griffin's guilt in the killing of Quintin Moss that was presented at trial was overwhelming. Ground 12 should be denied.

Finally, Griffin contends that he was denied his equal protection and due process rights because the sole aggravating circumstance in his case was applied in an overly broad fashion, thus allowing the arbitrary and capricious imposition of the death penalty. Griffin challenges the application of former §565.012.2(3), R.S.Mo. 1978 (repealed, effective 10-1-84). That statutory aggravating circumstance required the state to prove beyond a reasonable doubt that Griffin, "by his act of capi-

tal murder [,] knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person . . .." Griffin contends that the instruction was devoid of clear and objective standards. Instruction No. 20 provided:

> In determining the punishment to be assessed against the defendant for the murder of Quintin Moss, you must first unanimously determine whether the defendant by his act of murdering Quintin Moss knowingly created a great risk of death to more than one person in a public place by means of a weapon which would normally be hazardous to the lives of more than one person.
>
> You are further instructed that the burden rests upon the state to prove beyond a reasonable doubt the foregoing circumstance, and that it is an aggravating circumstance. The defendant is not required to prove or disprove anything.
>
> Therefore, if you do not unanimously find that the evidence beyond a reasonable doubt that the foregoing circumstance exists and

> that it is an aggravating circumstance, you must return a verdict fixing the punishment of the defendant at imprisonment for life by the Division of Corrections without eligibility for probation or parole until he has served a minimum of fifty years of his sentence.

(Resp. Exh. B, at 45).

The death penalty cannot be imposed without a finding of at least one aggravating circumstance. Zant v. Stephens, 462 U.S. 862, 878-80 (1983). Aggravating circumstances must genuinely narrow the class of persons subject to the death penalty and reasonably justify imposing a more severe sentence on a particular defendant than on others convicted of murder. Id., at 877. Therefore, the aggravating circumstance may not be impermissibly vague. Id., at 881.

In order for the death penalty to not be applied in an arbitrary and capricious manner, the state "must chan-

nel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'" Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (footnotes omitted). Furthermore,

> Because the channeling function of an aggravating circumstance requires objective determination of such a factor, it must be described in "terms that are commonly understood, interpreted and applied." Cartwright v. Maynard, 822 F.2d 1477, 1485 (10th Cir. 1987) [, aff'd, 108 S.Ct. 853 (1988)]. Otherwise a standard may be so vague that it would "fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in [Furman v. Georgia, 408 U.S. 238 . . . (1972)] could occur." Zant v. Stephens, 462 U.S. 862, 877 . . . (1983). The Cartwright court recognized that if "an aggravating circumstance is defined and applied so broadly that it conceivably could cover every first degree murder, then it obviously cannot fulfill its

> constitutional responsibility to eliminate the consideration of impermissible factors and to provide a recognizable and meaningful standard for choosing the few who are to die." Cartwright, 822 F.2d at 1485, quoting Rosen, The "Especially Heinous" Aggravating Circumstance in Capital Cases--The Standardless Standard, 64 N.C.L.Rev. 941, 954 (1986).

Newlon v. Armontrout, 693 F.Supp. 799, 813 (W.D. Mo. 1988) (holding that failure of trial court to provide a clear, limiting directive for "depravity of mind" required finding term unconstitutionally vague), appeal pending, No. 88-2385 (8th Cir.).

Unlike the circumstances at issue in Cartwright and Newlon, the aggravating circumstance herein does not require a narrowing construction because the terms contained "are commonly understood, interpreted and applied." Newlon, supra, 693 F.Supp. at 813. They are, therefore, capable of objective determination without a limiting

directive being provided by the trial court to the jury. See, Maynard v. Cartwright, 108 S.Ct. 1853, 1858 (1988). Griffin's federal habeas ground 16 should be denied.

Because the record clearly demonstrates that Griffin is not entitled to federal habeas relief on his grounds 2, 4, 7, 8, 10, 11, 12 and 16, an evidentiary hearing is not now required. In sum, these grounds should be denied.

RECOMMENDATION

For the reasons set forth above, it is the recommendation of the undersigned United States Magistrate that petitioner's federal habeas grounds 1, 5, 6, 9, 14 and 15 be barred from review by the Court in this proceeding. It is further recommended that petitioner's grounds 3, 13, and 17 be dismissed by the Court for failure to raise any

constitutional claim. It is further recommended that petitioner's grounds 2, 4, 7, 8, 10, 11, 12 and 16 be denied on their merits. Finally, petitioner's request for an evidentiary hearing should be denied. The parties are advised that they have twenty (20) days in which to file written objections to this Report and Recommendation.

--David D. Noce--

UNITED STATES MAGISTRATE

Signed this 27th day of September, 1989.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-2377EMSL

Larry Griffin,	*	
	*	
Appellant,	*	
	*	Order Denying
vs.	*	Suggestion for
	*	Rehearing En
Paul Delo,	*	Banc
	*	
Appellee.	*	

The suggestion for rehearing en banc is denied. Judge Fagg, Judge Bowman, and Judge Hansen would grant the suggestion.

A separate order will be entered with respect to the petition for rehearing by the panel.

March 24, 1992

Order Entered at the Direction of the Court:

--Michael E. Gans--

Clerk, U.S. Court of Appeals,

Eighth Circuit